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BEFORE THE  
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS & COMPANY

Complainant

v

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant

Docket No. NOR 42125

NOV 23 2011

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Public Record

PETITION FOR SUBPOENA

Pursuant to 49 U.S.C. § 721(e) and 49 C.F.R. § 1117.1, Norfolk Southern Railway Company ("NS") respectfully petitions the Board to issue a subpoena directed to Sentinel Transportation, LLC ("Sentinel"), an affiliate of Complainant E.I. du Pont de Nemours & Company ("DuPont"). The specific information sought is detailed in the proposed subpoena attached as Exhibit 1. These requests are related to the above-captioned Board proceeding, are relevant to important issues in this case, and are narrowly drawn so that the benefit of production far outweighs any burden on Sentinel. Counsel for DuPont has authorized counsel for NS to represent that DuPont consents to this Petition and that counsel for DuPont will accept service of a subpoena to Sentinel.

In addition, NS respectfully requests that the Board postpone the deadline for it to decide NS's Second Motion to Compel filed October 31, 2011 ("Second Motion") and that the Board hold the Second Motion in abeyance while NS pursues the third party discovery requested in this Petition. NS reserves its rights to request a Board ruling on the Second Motion to Compel in the event that Sentinel refuses to produce information responsive to a subpoena. Counsel for DuPont has authorized counsel for NS to represent that DuPont consents to the Board holding

the Second Motion in abeyance and postponing the deadline for a Board decision on that Motion until after the Board has acted on this Petition and Sentinel has completed its production of information responsive to the subpoena.

## **I. BACKGROUND**

The present Petition is intended to resolve the discovery dispute raised in NS's pending Second Motion to Compel. On September 19, 2011, NS served DuPont with NS's Second Set of Interrogatories and Requests for Production of Documents ("Second Requests"). The Second Requests asked, among other things, that DuPont provide certain information related to Sentinel, a DuPont affiliate that operates a private truck fleet that transports products for DuPont and ConocoPhillips. *See* NS Second Motion to Compel at 2-5 (detailing specific discovery requests and further information related to Sentinel operations). On October 19, DuPont served its Responses to the Second Requests and objected to providing information about Sentinel on the grounds that Sentinel was "a separate legal entity from DuPont."

After unsuccessfully attempting to resolve this dispute with DuPont, *see id.* at Exs. G & H, NS filed the Second Motion, requesting a Board order compelling DuPont to produce information in Sentinel's possession. DuPont filed an opposition to the Second Motion on November 10, 2011, arguing that DuPont lacked control over Sentinel information. Significantly, DuPont did not contest NS's showing that the information requested in the Second Motion to Compel was relevant: DuPont contended only that it lacked the ability to obtain the requested information from Sentinel. Board staff convened a discovery conference with the parties regarding the Second Motion on November 18, 2011. Subsequent to the discovery conference, NS and DuPont agreed that NS would file this Petition for third party discovery and

that the deadline for a Board decision on the Second Motion to Compel should be suspended pending completion of that third party discovery.

## II. THE BOARD SHOULD ISSUE THE REQUESTED SUBPOENA.

The Board's authority to issue a third party subpoena is well established. 49 U.S.C. § 721(c) provides that the Board may subpoena records related to a proceeding of the Board, and the Board has recognized and exercised its statutory authority to subpoena third parties in rate reasonableness cases. *See Ariz. Pub. Serv. Co. & Pacificorp v. Burlington Northern & Santa Fe Ry. Co.*, S.T.B. Docket No. 41185, at 1 (served Dec. 23, 2003); *Wis. Power & Light Co. v. Union Pac. RR Co.*, S.T.B. Docket No. 42051, at 2-3 (served June 21, 2000). Whether a subpoena should be issued is determined on a case-by-case basis. *See id.* at 3. The scope and relevance of a subpoena should be narrowly drawn such that the burden of obtaining the information does not outweigh its value. *Id.* at 4; *Otter Tail Power Co. v. Burlington Northern & Santa Fe Ry. Co.*, S.T.B. Docket No. 42071, at 5 (served Nov. 15, 2002).<sup>1</sup>

The Board should exercise its statutory authority here. The Sentinel information in the Subpoena attached as Exhibit 1 is relevant to this case, and specifically to DuPont's ability to prove that there is no effective competition from intermodal alternatives for any of the challenged movements. The Board's jurisdiction to consider rate reasonableness is limited to instances where there is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). The Board has recognized the critical importance of the qualitative market dominance threshold in recent

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<sup>1</sup> The Board has held that it will not issue subpoenas where the third party is willing to produce voluntarily. *Ariz. Elec. Power Coop. v. Burlington Northern & Santa Fe Ry.*, S.T.B. Finance Docket No. 34041, at 4-5 (served Dec. 26, 2001). DuPont has informed NS that DuPont asked Sentinel to provide information responsive to the discovery requests at issue in the Second Motion and that Sentinel was unwilling to voluntarily produce responsive information.

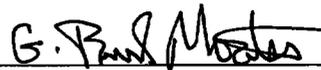
cases. *Total Petrochemicals USA, Inc v CSX Transp., Inc.*, S.T.B. Docket No. NOR 42121, at 4 (served Apr. 5, 2011) (granting motion to expedite consideration of market dominance); *M&G Polymers USA, LLC v CSX Transp., Inc.*, S.T.B. Docket No. NOR 42123, at 3 (served May 6, 2011) (same). Here, NS believes that information about the size and capacity of Sentinel's trucking fleet and about any Sentinel commitments to use trucks to service ConocoPhillips is relevant to evaluating the extent to which DuPont could rely on Sentinel trucks to transport the issue commodities. *See* NS Second Motion at 12-14. There is no question that the requested information is "related to a Board proceeding" within the meaning of 49 U.S.C. § 721.

Moreover, the Subpoena attached as Exhibit 1 is narrowly tailored to relevant issues in this proceeding and is not unduly burdensome to Sentinel. While the document and information requests in the attached Subpoena are based on the requests at issue in the Second Motion, NS has narrowed the focus of those requests in several respects. For instance, the Subpoena makes clear that Sentinel may produce information about its truck shipments on an aggregated basis, and it eliminates several subparts from the original NS discovery requests. The information requested by the Subpoena should be readily available to Sentinel and should not require an unduly burdensome search.

Finally, issuing the attached Subpoena likely will eliminate the administrative burden to the Board of further proceedings on the Second Motion. NS will withdraw the Second Motion once Sentinel reasonably and adequately complies with the Subpoena.

For the above reasons, NS asks the Board to issue a Subpoena directed to Sentinel Transportation in the form attached as Exhibit 1. NS further asks the Board to indefinitely postpone the deadline for its decision on NS's Second Motion to Compel and to hold the Second Motion in abeyance while NS pursues third party discovery of Sentinel.

Respectfully submitted,



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Dated: November 23, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of November, 2011, I caused a copy of Norfolk Southern Railway Company's foregoing Petition for Subpoena to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno  
Sandra L. Brown  
Jason R. Tutrone  
Thompson Hine LLP  
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Washington, DC 20036

  
Eva Mozcha Brandon

# **EXHIBIT 1**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY

Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant

Docket No. NOR 42125

**SUBPOENA**

Pursuant to 49 U.S.C. § 721, the Surface Transportation Board ("Board") hereby issues this Subpoena directing Sentinel Transportation, LLC ("Sentinel") to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

**I. Instructions**

1. The documentary evidence requested in this Subpoena shall be produced within twenty days of service of the Subpoena on Sentinel, unless otherwise agreed by counsel to the parties. Sentinel should produce responsive documents to counsel for Defendant Norfolk Southern Railway Company, at the offices of Sidley Austin LLP, 1501 K Street, N.W., Washington, D.C. 20005.

2. Responsive documents that are confidential or highly confidential may be produced in accordance with the terms of the Board's January 11, 2011 Protective Order in the above-captioned proceeding.

3. This Subpoena encompasses all information and documents that are in your possession, custody, and control or that are available or accessible to you, including information and documents available to (1) all business entities you own or control; (2) any of your agents, consultants, attorneys (to the extent not privileged), experts, investigators, representatives, or any other person or persons acting for you or on your behalf; and (3) other third parties from which you may obtain such information.

## **II. Definitions**

1. "Complaint" means the Amended Complaint filed by E.I. du Pont de Nemours & Company with the Surface Transportation Board in STB Docket Number NOR 42125, dated May 11, 2011.

2. "Document" is used in its broadest sense as defined by 49 C.F.R. § 1114.30(a)(1).

3. "Issue Commodities" means the commodities or products listed in the "Commodity Description" column of Exhibits A and B to the Complaint.

4. "Sentinel" means Sentinel Transportation, LLC, a Delaware corporation and affiliate of Complainant E.I. du Pont de Nemours & Company.

5. "You" and "your" refer to Sentinel, as defined herein, including its agents, consultants and all others acting on Sentinel's behalf or at its direction.

## **III. Documentary Evidence to Be Produced**

1. Please produce documents or information sufficient to show the following:
  - a) The total number of trucks owned, leased, and/or operated by Sentinel;
  - b) Separately for each Issue Commodity, the number of trucks owned, leased, and/or operated by Sentinel that could be used to transport that Issue Commodity; and
  - c) All Sentinel truck shipments of the Issue Commodities between 2006 and the present for the account of ConocoPhillips. This information may be provided on an aggregate basis by year and commodity.

2. Please produce all Sentinel contracts with ConocoPhillips for transportation of ConocoPhillips products that were in effect between 2008 and the present. You may redact contract provisions related to the specific rates Sentinel charged ConocoPhillips for transportation.

3. Please produce documents or information sufficient to show the following as to each truck owned or leased by Sentinel Transportation LLC:

- a) The owner or lessee of the truck;
- b) The location(s) from which the truck is assigned;
- c) Truck model or type;
- d) Date of purchase or lease;
- e) Original cost plus additions and betterments;
- f) Description of financing vehicle (e.g., equipment trust);
- g) Debt rate as a percent;
- h) Finance terms (in years);
- i) All Issue Commodities that the truck could be used to transport.